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No. 88-643

In The
Supreme Court of the United States
October Term, 1988

ATLANTIC TELE-NETWORK CO.,
a Virgin Islands Corporation,

Petitioner,

v.

THE PUBLIC SERVICES COMMISSION OF THE VIRGIN ISLANDS, PATRICK M. RICE, EXECUTIVE DIRECTOR OF THE PUBLIC SERVICES COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

MARIA TANKENSON HODGE, ESQUIRE
MARIA TANKENSON HODGE, P.C.
P.O. Box 4511
St. Thomas,
U.S. Virgin Islands 00803
(809) 774-6845

Counsel for Respondents

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Does the issuance of a declaratory judgment and permanent injunction by a district court, enjoining enforcement of a territorial law respecting regulation of utilities, which is subsequently held erroneous on appeal and reversed, immunize conduct prior to reversal on appeal from enforcement of the valid territorial law, so as to render the controversy moot?

2. Does the Virgin Islands Public Services Commission have jurisdiction to regulate the sale of a territorial public utility's stock under V.I. CODE ANN. tit. 30, §§ 1-44 (1986)?

3. Does Virgin Islands law, conferring upon the territorial Public Services Commission the jurisdiction to regulate sales of stock of public utilities incorporated in the territory, constitute an impermissible restraint on interstate commerce?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the Public Services Commission of the Virgin Islands, and Patrick M. Rice, Executive Director of the Public Services Commission respectfully ask the court to deny the petition for a writ of certiorari for the reasons set forth below.

STATEMENT OF FACTS

Atlantic Tele-Network Company (hereinafter ATN) challenges the authority of the Public Services Commission of the Virgin Islands (hereinafter PSC) to regulate the sale of the stock of the Virgin Islands Telephone Corporation (hereinafter Vitelco) to ATN.[1] Vitelco is the only operating telephone company in the U.S. Virgin Islands. It was created in 1959 as a wholly owned subsidiary of the International Telephone and Telegraph Company (hereinafter ITT) pursuant to an agreement between the Government of the Virgin Islands and ITT. The 1959 agreement prohibited the transfer of Vitelco's

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[1]This statement of facts is taken, for the most part, directly from the opinion of the court of appeals. The Petition, on the other hand, is replete with statements having absolutely no basis in the record, including claims about what other nations in the Caribbean are allegedly doing with respect to utilities, Petition p. 16, n.12, claims the Virgin Islands' "two critical problems are the lack of insufficient private employment (sic) and a weak infrastructure," (quoting an unnamed source answering a question in an appendix to a Senate report from 1983) Petition, p. 15, and an extended and highly distorted discussion of now pending rate cases in which no final order has been entered.

There are also contentions in the Petition about settlement discussions, which, in addition to being incorrect in many respects, obviously do not belong in a Petition for Certiorari. Additionally, there are editorial comments or arguments included in the appendix, presented as if part of the original document, without any indication they have been authored by the petitioner and are not a part of the authentic record. See Appendix p. 63, where the first paragraph appearing in text of a transcript has apparently been created by Petitioner and inserted as part of its argument.

stock for a period of five years,[2] and required Vitelco to sign a franchise agreement that included a prohibition against transfer of the franchise without the consent of the PSC.

On January 9, 1987, ITT entered a Stock Purchase and Sale Agreement in which it agreed to sell all the shares of Vitelco's capital stock to ATN, a corporation that had been formed by a group of investors for the purpose of acquiring and controlling Vitelco.

The PSC learned of this agreement and attempted to exercise its regulatory authority over Vitelco by imposing conditions on the terms of the stock sale. The PSC noted concern over the proposed sale both because the prospective purchasers appeared to lack any experience with an operating telephone company and because the proposed financing, which was a leveraged buyout in essence, appeared to pose substantial risks for the utility's financial situation. The PSC held several hearings beginning in January, 1987, and entered several orders setting forth its conditions for approving the sale. During this process there were several changes in the identity of the proposed purchasers and in their financing proposals.

On April 23, 1987, the PSC issued an order which concluded that certain terms of the sale, relating primarily

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[2]The provision stated:

> That, for a period of at least five (5) years from the date of such assignment, [ITT] will not relinquish majority stock control of [Vitelco], and [Vitelco], by its acceptance of the assignment of this agreement warrants that it will not, within the said five year period, sell its capital stock in such manner as to transfer stock control to any party other than [ITT].

App. at A 311 § 1(d)

to financing, threatened the economic viability of Vitelco, and directed that the sale not be consummated unless certain conditions were satisfied. The primary difficulty identified by the PSC was that of a purchase price of approximately $98 million, when the utility's book value was only approximately $60 million and ATN was to put up only $15.5 million in equity and borrow the remaining $82.5 million from its principal stockholder using the assets of Vitelco as collateral.

In order to insure that ATN would be able to pay its indebtedness to its principal stockholder, the agreement of sale called for the imposition of several restrictions on Vitelco. First, there was to be a "negative pledge of assets," under which Vitelco, for the duration of ATN's loan, would be foreclosed from pledging any of its assets to obtain additional capital, with the sole exception that Vitelco could execute purchase money mortgages in connection with purchases of new equipment. Second, for the duration of the loan, Vitelco was to take no action that would restrict Vitelco's ability to pay dividends to ATN. These restrictions led the PSC to conclude that

> inasmuch as Vitelco will be ATN's sole source of repayment of its $80 million debt, as well as its mandatory 12% annual dividend to preferred shareholders, there will be an unavoidable financial harm to Vitelco, including an immediate negative effect on retained earnings, and a negative cash flow by 1994, with a consequent upsurge in pressure to sacrifice reasonable capital investment requirements and prudent maintenance and operation expense obligations. Further, since the Vitelco stock is pledged as security for the debt, default would result in a chaotic situation for the utility.

App. at pp. 35-36.

While the PSC proceedings were in progress, ATN contended that the PSC lacked jurisdiction to review or condition the sale of stock. The Attorney General of the Virgin Islands issued an opinion confirming the agency's jurisdiction. In light of this dispute the territorial legislature determined to pass a clarifying amendment to the code to confirm the PSC's authority in such matters. Accordingly, on May 18, 1987, the Virgin Islands Legislature enacted Act No. 5258, which was duly signed into law by the Governor. This statute provides:

> No person or corporation, whether or not organized under the laws of the Territory, shall sell, acquire or transfer control, either directly, or indirectly of any public utility organized and doing business in this territory, without first securing authorization from the Commission. Any such acquisition or control without prior authorization shall be void and of no effect.

1987 V.I. Acts 5258 § 1(a) (to be codified at V.I. CODE ANN. tit. 30, § 43a, App. p. 50.

The PSC scheduled a final hearing on the matter, but before the hearing could be held, ATN filed this suit in the District Court of the Virgin Islands on June 2, 1987, challenging the jurisdiction of the PSC to review or impose any conditions on the sale. ATN sought both declaratory and injunctive relief against interference by the PSC with ATN's purchase of Vitelco's stock. The district court promptly granted ATN's summary judgment motion and entered a judgment of permanent injunction prohibiting the PSC from reviewing the sale or imposing any conditions upon it. Within a few days after the district court announced its decision orally, ATN and ITT proceeded to

close the sale of stock without PSC approval. Thereafter, while the appeal was pending and without notice to the PSC, ATN negotiated a loan package of $104 million. ATN caused Vitelco to directly borrow $60 million, secured by mortgages on all its real property and UCC liens on all its personal property. (Affidavit of Cornelius Prior filed with the Court of Appeals). ATN thereupon directed the utility to declare a dividend in favor of ATN for virtually the entire $60 million, which in turn was used to retire the short term acquisition loan from E.F. Hutton, one of the original principals of ATN. Further, Vitelco was caused by ATN to guarantee an additional $44.4 million loan to ATN as part of the refinancing. All of the refinancing of the purchase was effected while the appeal was pending, after briefing and oral argument, but before the decision of the court of appeals was issued.

On appeal, the Third Circuit unanimously found the PSC did have jurisdiction under the broadly worded original statute. While the PSC did not have direct jurisdiction over ITT or ATN, *per se*, the court of appeals concluded it did have authority to regulate what the purchaser could "extract from or impose upon Vitelco". The decision of the district court was accordingly reversed. A petition for rehearing was denied.

The mandate issued on July 25, 1988, and the matter was remanded to the district court, which has now vacated its injunction and is conducting proceedings in conformity with the appellate decision.[3]

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[3]No motion to stay the mandate under FRAP 41 was filed.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Matter Is Not Moot. The Court of Appeals heard and rejected the argument advanced by ATN that the case was moot due to the closing held on the sale of stock. The Court of Appeals was also informed, by Motion to Supplement the Record and Affidavit, of the substantial refinancing which was effected by ATN after that closing.

In rejecting the mootness claim the court relied upon its opinions in *Jersey Cent. Power & Light Co. v. Township of Lacey,* 772 F.2d 1103 (3d Cir. 1985), cert. denied 475 U.S. 1013 (1986), and *Natural Resources Defense Council, Inc. v. U.S. EPA,* 683 F.2d 752 (3d Cir. 1982). It said:

> In this case, the court can afford meaningful relief by reversing because the PSC would then have the authority to impose fines for a violation of its order and perhaps to seek rescission of the contract. *See* 30 V.I.C. § 39 (1976). Although the PSC could choose not to seek these remedies, its right to consider them in subsequent proceedings makes this controversy a live one.
>
> This case is controlled by this court's decision in *Jersey Central Power & Light.* In that case, a utility company brought suit to declare unconstitutional a town's ordinance prohibiting the importation of nuclear waste into the town for the purpose of storage there. The District Court declared the ordinance unconstitutional and enjoined its enforcement, and the town appealed. While the appeal was pending, the utility company placed nuclear waste in a storage facility in the town. The Court of Appeals held that the case was not moot on two separate grounds. First, the court noted that the District Court's injunction

> allowed storage as well as importation. The court then reasoned that, because the storage continued, if the court reversed the town could get an injunction requiring the removal of the nuclear waste. Second, the court noted that the town could impose fines on the utility company under the ordinance if the court reversed. *Jersey Central Power & Light* supports the PSC's position since, like the town in that case, the PSC could seek to impose fines or to rescind the sale if the judgment of the District Court is reversed.

App. p. 6, n.2.

While the Court of Appeals did not mention *Edgar v. Mite Corp.*, 457 U.S. 624 (1982), that decision would not suggest a contrary result. That matter involved a tender offer made after entry of a preliminary injunction, later made permanent, prohibiting enforcement of a state statute intended to regulate corporate takeovers. There the plaintiff proceeded with the tender offer without complying with the state act after the injunction was issued. It was argued on appeal that the case was moot, but the Court held it was not inasmuch as state officials had stated they would prosecute the offeror if the lower court's decision were reversed. Obviously, *Edgar v. Mite* supports the court of appeals' conclusion that the instant matter is not moot, for the same reasons found persuasive in *Edgar*.

As in *Edgar v. Mite*, the Petitioner's effort here to raise the issue that the lower court's erroneous injunction creates a complete bar to further proceedings is, at best, premature, 457 U.S. at 630, and for the reasons expressed there in the concurring opinion of Justice Stevens, wrong as a matter of law. One purpose of seeking a declaratory judgment is, of course, to test the legality of state law before engaging in prohibited conduct.

> Recognition of this fact, however, does not determine the point at which an individual may act with absolute assurance that he may not be punished for his contemplated activity. The fact that a federal judge has entered a declaration that the law is invalid does not provide that assurance; every litigant is painfully aware of the possibility that a favorable judgment of a trial court may be revised on appeal. 457 U.S. at 651.

II. The Virgin Islands Statutes Were Not Misconstrued By The Court of Appeals. Interpretation of the Virgin Islands' statutory framework for public utility regulation was carefully undertaken by the Court of Appeals.[4] Certainly this decision does not conflict with any decision of another court of appeals—none of which have jurisdiction over the Virgin Islands—or with any decision of this Court.

The suggestion that the opinion runs afoul of *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361 (1986) was made to the Court of Appeals and properly rejected. That decision, interpreting the Bank Holding Company Act, concluded the Federal Reserve could not broaden its own jurisdiction to include as "bankers" all entities making commercial loans

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[4]Petitioner alleges that counsel for the PSC made "misleading" arguments to the Court of Appeals, claiming that these arguments concerned "facts" and since ATN did not consider facts "relevant", it "ignored" the misinformation. Petition p. 9, p. 13 n.9. Passing the fact that the allegedly misleading information consisted of direct quotes from transcripts of PSC hearings, most attorneys who have practiced before the Court of Appeals for the Third Circuit would agree that court is fully able to consider both facts and law in the same case. It may also be noted that counsel representing ATN before the court of appeals, Covington & Burling, has not authored this Petition.

simply by implementing regulations or adopting definitions of an inclusive nature, when the very entities involved had been exempted from FRS jurisdiction by *explicit* terms in the congressional act. Here, however, the territorial statutes are generally and broadly written to confer on the PSC the power to insure that the public utilities serving the Virgin Islands furnish "servic and facilities reasonably safe and adequate and in all respects just and reasonable." V.I. CODE ANN. tit. 30, § 2.

In the words of the court of appeals, this broad power coupled with an expansive statutory directive that the Commission's power and authority are to be liberally construed, and deemed to include "all additional, implied, and incidental power which may be proper and necessary to effect and carry out . . ." its mandate, V.I. CODE ANN. tit. 30, § 41, requires the conclusion that

> In order to fulfill this responsibility, the PSC must have the authority to require a utility to maintain the kind of financial stability that will enable it to continue providing adequate facilities and service at reasonable rates in the future. In particular, if a sale of a utility's stock is proposed on terms that the PSC concludes will deprive the utility of such financial stability, it must be able to act effectively or its statutory mandate will go unfulfilled.

App. p. 8.

There is in this statutory scheme no express exclusion—as there was in *Dimension Financial Corp.*—of the jurisdiction exercised. There is, however, ample confirmation of the legislative intent that the PSC's jurisdiction should be broadly construed, including the matter of sale of stock of this utility, which was confirmed in the very franchise of Vitelco, App. p. 3, as the original legislation required.

Moreover, ATN misunderstands the nature of the Court of Appeals' decision. See Petition, p. 5. ATN focuses on the PSC's order No. 22/1987, entered on April 23, 1987, as "the subject matter of this controversy" rather than on the fundamental issue—whether the PSC had the right to review and regulate a sale of stock of the telephone company *at all.* When the district court entered the injunction it did not do so upon a finding that the PSC's order was unreasonable or unduly burdensome. It did so stating its view that the statutes left the PSC no power whatsoever to "grant or withhold its approval to a sale of a public utility. Therefore, it could not lawfully impose conditions on such a sale." App. p. 23. In this, the court of appeals unanimously reached a contrary conclusion, finding ample authority in the statutes for such review. Accordingly, the importance of the acknowledgements the PSC's hearings drew from ATN's counsel in February, 1987, concerning adverse consequences of the financing upon Vitelco as then proposed, were highly relevant to confirm that the process of PSC review of the sale served an important public purpose—an issue raised by the contract clause claim which ATN, itself, had presented in its complaint. In fact, the PSC order ATN now emphasizes was not even final when this action interrupted administrative proceedings, App. p. 10, n.3, and neither the district court nor the Court of Appeals reached the issue of its specific terms.

The decision of the Court of Appeals interpreting the Virgin Islands statute is neither inconsistent with the decision of another circuit, inconsistent with any decision of this Court, nor does it decide any question of federal law.

III. No Impermissible Restraint On Interstate Commerce Arises From This Statute. The Virgin Islands statutes, creating and granting jurisdiction to the Public Services Commission to regulate public utilities doing business in the Virgin Islands, including the sale of stock of such utilities, does not constitute an impermissible restraint on interstate commerce under the principles set forth in *Edgar v. Mite Corp.*[5]

Edgar v. Mite involved a conflict between a federal statute, carefully crafted to regulate corporate takeover attempts without undue preference for management or for the tenderor. The state of Illinois had adopted a statute on the same subject imposing substantial additional burdens on such attempts when an Illinois target company was involved. The federal law specified state jurisdiction in the field could continue "insofar as it [did] not conflict with the provisions of [the Williams Act]." 457 U.S. 630. The Court noted that any state statute which did conflict with the federal act was, of course, void. The issue posed was whether the Illinois law frustrated the objectives of the federal act "in some substantial way." 457 U.S. at 632. In resolving that issue the test was expressed in these words:

> A state statute must be upheld if it regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only

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[5]The Virgin Islands Public Services Commission exercises no jurisdiction over long distance telephone carriers, nor is Vitelco engaged in the supply of interstate telephone service. It is a local telephone company providing service to the U.S. Virgin Islands. Long distance telecommunications to and from the territory are supplied primarily by AT&T.

> incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative benefits. 457 U.S. at 640.

Here the Virgin Islands statutes regulate local public utilities—a field long held infected with a substantial public interest. Sale of the only utility providing telephone service in the U.S. Virgin Islands, to one not qualified by experience or financial resources to effectively operate the utility, could undermine the territory's economy and social well being, if the result were to be a failure of the utility to maintain its capability to render adequate service at reasonable rates. Surely, any effect on interstate commerce inherent in such review, is incidental at best. Indeed, absolutely no showing was made on the record below of any adverse effect on interstate commerce resulting from the PSC's regulatory review.

Neither is any federal statute identified—as it was in *Edgar v. Mite*—which the Virgin Islands law compromises or impairs. If anything, recent decisions of this Court have confirmed the propriety of active local participation by regulatory commissions in the area of telecommunications, notwithstanding the parallel role of the federal regulatory authority in the field of interstate communications. *Louisiana Public Services Comm. v. FCC,* 476 U.S. 355 (1986).

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CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully Submitted,

MARIA TANKENSON HODGE, ESQUIRE
MARIA TANKENSON HODGE, P.C.
P.O. Box 4511
St. Thomas,
U.S. Virgin Islands 00803
(809) 774-6845

Counsel for Respondents